Vol 31
No. 704

Office - Supreme Court, U. S.
FILED
JAN 16 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1940.

MONARCH DISTRIBUTING COMPANY, a Corporation, and
JOSEPH S. MEYER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit,

With

SUPPORTING BRIEF.

HAROLD J. BANDY,
JOHN M. KARNS,
604 Spivey Building,
East St. Louis, Illinois,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Monarch Distributing Company, a corporation, and Joseph S. Meyer, petitioners, by Harold J. Bandy and John M. Karns, their counsel, petition this Honorable Court to grant the writ of certiorari, addressed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding it and the clerk thereof to certify to this Honorable Court the records and proceedings of the above-entitled case in that court, numbered 7281 therein, wherein your petitioners were appellants, and respondent, United States of America, was appellee, together with its opinion therein, for review and determination of said cause by this Court.

Petitioners tender herewith their petition, supporting brief, and a certified copy of the entire record in the cause, together with ten copies of the record as printed in the United States Circuit Court of Appeals.

OPINION BELOW.

The opinion of the Circuit Court of Appeals was filed December 5, 1940. Petition for rehearing was denied December 18, 1940. A copy of the opinion appears in the appendix which follows petitioners' supporting brief.

STATEMENT OF THE MATTER INVOLVED.

Petitioner, Monarch Distributing Company, an Illinois corporation, is engaged in the wholesale liquor business at East St. Louis. Petitioner, Joseph S. Meyer, is president of the corporation.

Petitioners were jointly indicted in case No. 15,126 in the District Court of the United States for the Eastern District of Illinois. The first eleven counts charge petitioners with making false entries in records which wholesale liquor dealers are required to keep. The twelfth count charges conspiracy.

Monarch Distributing Company was also indicted in cause No. 15,129. This indictment contains seven counts. Counts 1, 2, 3, 5 and 6 charge the corporation with making false entries in records required to be kept by it in accordance with rules and regulations prescribed by the Commissioner of Internal Revenue. Count 4 charges the corporation with causing certain liquor to be shipped in packages that were not so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents of said packages and the quantity of spirituous liquors contained therein. The seventh count charges conspiracy.

The indictments were consolidated and petitioners were tried by the Court without a jury. The Court convicted petitioners upon all counts of indictment 15,126, excepting count 11, and found the corporation guilty upon all counts of indictment 15,129. The corporation was sentenced to pay a fine of $2,500.00 upon each indictment. Petitioner Meyer was sentenced, upon his conviction in case No. 15,126, to pay a fine of $1,000.00 and to serve a term of two years' imprisonment (R. pp. 425-430, incl.).

The counts which charge petitioners with making false entries allege violation of the following Act of Congress, enacted June 26, 1936 (26 U. S. C. A., Section 1208):

> "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records; Provided, That the Commissioner may in his discretion require such record to be kept at the place where the spirits are actually received and sent out. The records shall be kept and the transcripts shall be rendered in such form and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe.
>
> The records required to be kept under the provisions of this section, and regulations issued pursuant thereto, shall be preserved for a period of four years, and during such period shall be available during business hours for inspection and the taking of abstracts therefrom by the Commissioner or any internal revenue officer.
>
> Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, or to make entries therein, or cancels, alters, or oblit-

> erates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, or makes any false entry therein, or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years."

The Court of Appeals affirmed the conviction of both petitioners upon counts 1 and 6 of indictment No. 15,126 and of the corporation upon counts 1, 2 and 3 of indictment No. 15,129. These counts charge making false entries in violation of the quoted statute. The Court did not pass upon the convictions under the other counts, but said: "As the penalty imposed was not more than could have been imposed under them if they had stood alone, we need not consider the other counts of either indictment for the reason that errors, if any were committed under the counts not discussed, are not grounds for reversal."

The evidence shows that the Commissioner of Internal Revenue requires a wholesale liquor dealer to keep a record of all liquor received by him upon a form known as Treasury Form 52-A, and a record of all liquor sold by him upon a record known as Treasury Form 52-B. Paragraph 22 of Treasury Department Order 4764 (published in Volume 2, Part 2, of the 1937 issue of the Federal Register on pp. 1963 to 1965) requires him to transmit a full and complete transcript of forms 52-A and 52-B to the District Supervisor of the Alcohol Tax Unit on or before the 10th day of each month, the record to contain a transcript of all the business conducted during the preceding month.

Count 1 of indictment 15,126 alleges that, on July 24, 1939, petitioners made a false entry, in their 52-A record, of the receipt of certain liquor. It avers the liquor was purchased from Skye Distributing Company of East St. Louis on July 20, 1939; that the entry was not made in form 52-A until July 24, 1939, and that said entry falsely states that the liquor was received on July 22, 1939 (R. pp. 2 and 3).

The conviction of petitioners under this count is not supported by any evidence. The record is devoid of any proof. Although this Honorable Court will not disturb a conviction on the ground of failure of proof if the record contains slight evidence from which an inference of guilt can reasonably be adduced, it will not hesitate to reverse a judgment which has no evidence to support it.

The evidence for the Government shows that petitioners received the liquor from Skye Distributing Company on July 20, 1939. Sol Auslander, an official of Skye Distributing Company, testified the liquor was sold to Monarch Distributing Company on July 21, 1939, and he exhibited the 52-B record of Skye Distributing Company corroborating this statement (R. p. 409). Petitioners recorded the receipt of this liquor in their 52-A record on July 24, and the entry shows that the liquor was received on July 22 (R. p. 132).

The prosecution concedes that the entry truthfully records every detail of the transaction except the actual date of receipt of the liquor; that it speaks the truth as to the quantity and brands of liquor purchased, the serial numbers, the price paid, the name and address of the vendor. All taxes were paid upon this liquor. The Government was not defrauded of any revenue. The Government's strongest evidence merely shows that the entry errs as to the actual day on which the liquor was received.

Petitioners sold this liquor to Melvin Thompson of Denton, Texas, on July 22, and a truthful entry of this sale was made in record 52-B (R. p. 144).

Petitioner Meyer explained the delay in making this entry. His explanation is not contradicted by any other evidence. He said: "The shipment arrived some time in the afternoon of the 21st. The next day was Saturday and I was busy. It probably laid on my desk and was not handed to the girl until some time on Monday after checking my bank account" (R. p. 389).

The opinion of the Court of Appeals erroneously holds that an entry of liquor purchased must be made on the day the liquor is received. This was true under the former law, which said: "Every rectifier and wholesale liquor dealer shall provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner, and shall, on the same day, * * * enter in such book," etc. This is the Act of 1868, as amended by Act of February 27, 1877, c. 69, section 1, and Act of March 1, 1879, c. 125, section 5 (26 U. S. C. A., p. 127). Congress amended this statute on June 26, 1936 (c. 830, Title IV, section 411, 49 Stat. 1962; 26 U. S. C. A. Cumulative Pocket Part, Section 1208). The Act of 1936 provides that: "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits, received and disposed of by him." This is a sharp departure from the former act which required each transaction to be entered "on the same day." It cannot be presumed that Congress did not intend the change which the new law made. The law as amended merely requires that the dealer keep the record daily (that is, at all times) at his place of business, and that he transmit transcripts of same to the Commissioner of Internal Revenue in accordance with the rules and regulations promulgated by the Commissioner. The regulation,

heretofore quoted, requires the dealer to transmit to the District Supervisor of the Alcohol Tax Unit, on or before the 10th day of each month, a complete transcript of all business done during the preceding month. If the wholesale dealer keeps the record in his place of business at all times and transmits to the District Supervisor a correct transcript of all business transacted during a month before the 10th day of the month following, he complies with the statute and the regulations. Although he must keep a truthful record of each transaction of incoming and outgoing liquor, he is under no legal compulsion to record each transaction on the very day it takes place.

Moreover, the Court of Appeals erroneously affirmed the conviction upon Count 1 on the ground that petitioners neglected or omitted to make the entry. The opinion says: "The trial court found the appellants guilty, thus, necessarily, it found that the **omission** was intentional or by design." The statute makes neglect to keep the records an offense, but petitioners were not charged with neglect or omission. They were charged with making a false entry. Proof to sustain a conviction must relate to the charge in the indictment and not to some other offense that is not alleged.

The proof most favorable to the prosecution shows that petitioners did not attempt to deceive the Government and did not defraud it of any revenue. The entry in 52-A, although not made until three or four days after the actual receipt of the merchandise, set forth the facts meticulously and made available to the United States all information necessary to enable the officials charged with enforcement of the revenue laws to enforce the same.

The opinion of the Court of Appeals overlooks the fact that an entry, to be false, must be willfully made. A willful or deliberate wrong is actuated by bad motive, for the

purpose of bringing profit or advantage to to the wrongdoer. The record shows that petitioners gained no advantage or profit through their omission, for three or four days, to record the receipt of this liquor. From the viewpoint most favorable to the Government, the evidence shows nothing more than inadvertent or negligent delay. It does not show willful falsification. Where the liberty of a citizen is involved—here the sentence of petitioner Meyer is for two years—the proof must meet the charge.

The Court of Appeals also affirmed the conviction of petitioners upon Count 6 of indictment 15,126. This count charges petitioners with making a false entry in Treasury Department Form 52-B, their record of merchandise sold. The count charges that on October 13, 1939 (R. pp. 11 and 12), petitioners entered, in Form 52-B, that they sent certain described liquor to Joe Nelson, at Leonard, Texas, but that "the aforesaid alcoholic spirits set forth on said record and purporting to be sent to the aforesaid Joe Nelson at Leonard, Texas, were not then and there sent to Joe Nelson of Leonard, Texas, but were in truth and in fact sent to one Joe Nelson, then and there located at Kansas City, in the State of Missouri, the defendants then and there well knowing that the aforesaid entry was false."

There is a total failure of proof to sustain this count, and a fatal variance between the allegation and the proof. The prosecution proved, by agents of the alcohol tax unit, that petitioners shipped this liquor c. o. d., by Riss & Co., a common carrier, to Joe Nelson, Kansas City, Missouri, and that one Chester Tork, of Topeka, Kansas, received the liquor from the common carrier at Kansas City, and paid for it. The evidence for the Government shows that Roderick and Keeman, investigators for the Alcohol Tax Unit, pursued Chester Tork, with his automobile loaded with liquor, into Kansas City, Kansas, and arrested him. Over the objections of petitioners, agent Keeman testified

that Tork, after being arrested, stated that his name was Chester Tork and that he was taking the merchandise to Topeka, Kansas (R. p. 348). The prosecution offered this testimony concerning the statement of Tork, made after he had been arrested, upon the theory that he was a co-conspirator with petitioners and that any statement made by a conspirator is admissible in evidence against his co-conspirators. It is true that the statement of a conspirator, made outside the presence of his co-conspirators, is admissible in evidence against the co-conspirators, provided the statement is made during the existence of the conspiracy, but it is also true (as shown by authorities cited in our supporting brief) that the arrest of a co-conspirator precludes any further action by him, and terminates the conspiracy as to him, and any statements made by him outside the presence of his alleged co-conspirators, after his arrest, are not competent against the alleged co-conspirators for any purpose.

The sole evidence offered by the prosecution to support the allegation that petitioners falsely recorded in their 52-B record that certain merchandise was shipped to Joe Nelson at Leonard, Texas, when it was actually shipped to Joe Nelson at Kansas City, Missouri, is the foregoing evidence that the liquor was called for and paid for by Chester Tork, and that Tork, after being arrested, said he was taking the liquor to Topeka, Kansas. There is no evidence in the record that petitioners knew Tork would call for the liquor. There is no evidence to show, or from which the inference can be raised, that petitioners knew Joe Nelson would not call for the liquor. The record shows that petitioners shipped the liquor openly, by common carrier, without any attempt at concealment. Proof that Tork called for the liquor does not touch the vital question of whether petitioners knew the liquor was to be received by someone other than Nelson.

The burden rested with the prosecution to prove that petitioners knew that the entry was false when they entered, in 52-B, that the liquor was sent to Joe Nelson at Leonard, Texas. The count charges that, when petitioners made the entry, they well knew it was false. The evidence totally fails to prove this essential averment.

Meyer explained the facts concerning this shipment, and his testimony was not contradicted. He testified that, about July 21, 1939, a man called at the office of Monarch Distributing Company in East St. Louis, introduced himself to petitioner Meyer as Joe Nelson of Leonard, Texas, and exhibited a federal retail liquor dealer's license which had been issued to him by the Collector of Internal Revenue for the Second Texas District (R. pp. 390 and 391). Before selling to him, Mr. Meyer had a photostatic copy of the federal retail liquor dealer's license made for the file of Monarch Distributing Company. It was introduced in evidence (R. p. 391). Mr. Meyer further testified that Nelson arranged, at that time, to purchase whiskey; that he stated he would probably make future orders by telephone and have the liquor shipped c. o. d.; that he gave an order by long distance telephone on July 27, 1939, and specified that it be shipped c. o. d. by Riss and Company to Kansas City, Missouri, where Nelson or his agent would pick it up and take it on to Leonard, Texas. Nelson made his order of October 13th in the same way and gave the same instructions. Meyer further testified that he shipped this liquor, as directed, to Joe Nelson, Leonard, Texas, with a stopover at Kansas City, Missouri (R. p. 392), and that all other shipments to Nelson were made in the same way, in accordance with his instructions. This testimony of petitioner Meyer is not contradicted anywhere in the record.

The incompetent testimony of Agent Keeman that Chester Tork, after being pursued into Kansas City, Kan-

sas, and caught with the liquor, said he was taking it to Topeka, Kansas, sheds no light on the basic question of whether petitioners knew the liquor was to be received by Tork and taken to Topeka. There is no evidence anywhere in the record that shows any knowledge of petitioners that this merchandise was not bound for Leonard, Texas. There is no evidence that suggests or insinuates petitioners knew Tork, an imposter, was impersonating Joe Nelson.

The record shows that Tork was in the court room, in the United States District Court at East St. Louis, when this case was tried. He was brought to East St. Louis from Kansas by agents of the Government. He was in custody, in the court room, throughout the trial. Agents of Riss and Company identified him as the man who receipted for and took the liquor. Alcohol Tax Agents Roderick and Keeman also identified him. In spite of this, Tork was not called to the witness stand. He was the one person who could have testified, of his own knowledge, whether petitioners arranged to ship liquor to him under the name of Joe Nelson. Regardless of this, the Government did not use him. It is a recognized rule of evidence that, when a witness is available to a party, and he knows the truth of the controverted issue, and he is not used by the party who attempts to prove the issue, the conclusion follows that his evidence would be adverse to the contention of the party who should have used him. Petitioners presented this contention to the Court of Appeals, but the opinion of that court ignores this unusual feature of the case.

It was urged by petitioners, in the Court of Appeals, that it was prejudicial error to receive the testimony of agents Roderick and Keeman concerning statements made by Tork, outside of the presence of petitioners, after Tork was arrested. This important question is not referred to in the opinion of the Court of Appeals.

The charge in this count, as in count 1, involves tax-paid liquor. The Government was not defrauded of any revenue, and the prosecution did not introduce any testimony proving, or tending to prove, any profit or advantage which petitioners could have gained through misrepresenting the consignee or the destination of the liquor involved in this transaction.

Petitioners further represent that the United States Circuit Court of Appeals misapprehended the allegations of count 6 and the proof relating to same. The opinion says, concerning the shipment: "There were no words describing or designating the consignee's name or address on the cartons or boxes in which liquor was contained." Apparently the court believed petitioners were charged with failing to label the packages, in violation of Title 18, section 390, U. S. C. A. The count does not contain such a charge. The charge is limited to the making of a false entry. The statement of the Court of Appeals that the name and address of the consignee were not placed on the cartons or boxes does not refer to any charge in this count and is not supported by any evidence. Neither Keeman nor Roderick, the officers who arrested Tork and seized the liquor, testified to such facts (R. pp. 346-348, incl.).

The testimony wholly fails to prove any charge contained in count 6. There is no evidence that petitioners knew the liquor was not shipped to Joe Nelson at Leonard, Texas; or indicating petitioners knew that Nelson would not receive it at Kansas City, Missouri, and take it from there to Texas; or showing that petitioners knew an imposter named Tork was pretending to be Nelson and would receive the liquor and take it to Kansas. Evidence that Tork stated, after being arrested, that he was taking the liquor to Topeka, Kansas, does not prove petitioners shipped the liquor to Tork under an assumed name, or that petitioners knew Tork would receive it and take it into

Kansas. There is no proof whatever to support the charge in count 6 that petitioners knowingly made a false entry in their 52-B record. The evidence stands unimpeached that petitioners, in good faith, shipped this liquor to Nelson at Leonard, Texas, by way of Kansas City; that they shipped it openly by common carrier to Kansas City, there to be received and paid for by Nelson and taken by him to Leonard, Texas.

Taking all the evidence for the Government as true, there is nothing in the record to show that petitioners knowingly made a false entry. There is no evidence in this record to sustain the convictions under either count 1 or 6, the counts upon which the Court of Appeals affirmed the convictions.

The allegation contained in count 6, and the proof offered by the Government in support thereof, present questions of vital importance to every merchant engaged in the wholesale liquor business. A person intending to operate a wholesale liquor business obtains a federal basic permit, a federal license and the necessary state licenses. He invests his resources in the business. A stranger appears at his place of business and seeks to purchase liquor. The stranger exhibits a federal retail liquor dealer's license that has been sold to him by the United States Government. The stranger thereby submits persuasive credentials and the wholesaler believes him and sells liquor to him. The Government in this case contends that, if this stranger is an imposter, and if he has obtained the federal retail liquor dealer's license through fraud, the wholesaler sells to him at his peril. If the wholesaler accepts the imposter in good faith, sells to him and records the sale in 52-B as being shipped to him at his supposed address, is the wholesaler guilty of falsifying his 52-B record? Must the wholesale dealer jeopardize his basic permit, his licenses, his investment and his personal liberty every time he makes an

apparently legitimate sale to a stranger? Is this the risk he must take, the price he must pay, for engaging in a legitimate business?

Indictment No. 15,129.

The transactions involved in this indictment occurred before petitioner Meyer became connected with Monarch Distributing Company. The corporation alone is involved. The Court of Appeals affirmed the conviction under the first three counts of this indictment. These counts charge falsification of the 52-B record.

There is evidence in this case to sustain the conviction. The three sales involved in these counts were recorded as being made to Mike O'Brien, Topeka, Kansas, who, by his own admission, had been a customer of the corporation. O'Brien testified that he did not make the purchases involved in these three counts. Several witnesses, employees of Monarch Distributing Company, testified that he made them, but, of course, this merely created an issue of fact, and the conclusion of the trial court will not be disturbed, in a federal court, where there is some positive evidence to support the conviction.

We concede that the writ of certiorari should not issue to review the conviction of the corporation upon indictment No. 15,129.

QUESTIONS PRESENTED.

1. Does the Act of 1936 (U. S. C. A., Title 26, section 1208) require a wholesale liquor dealer to record, in his 52-A or B record, the receipt or sale of liquor on the actual date of the transaction?

2. Does a delay of three or four days in making a truthful entry of liquor received constitute the making of a false entry within the meaning of the statute?

3. Does the Amendment of 1936, which eliminates the requirement in the former Act that a wholesale liquor dealer record each transaction "on the same day," relieve the dealer of the burden of entering a record of each receipt of merchandise on the same day it is received?

4. Can a charge of making a false entry be sustained by mere proof of negligent delay in making an entry? Or upon proof of mistake as to the actual date on which a shipment of liquor was received?

5. Is the allegation, appearing in counts 1 and 6 of indictment 15,126, that the alleged false entry was made by the defendants, said defendants "then and there well knowing that the aforesaid entry was false," a material part of the accusation that must be proved?

6. Is the statement of an alleged co-conspirator, made after he has been arrested, and outside the presence of the defendants, admissible in evidence against the defendants?

7. Is the statement of an alleged co-conspirator, made outside the presence of defendants, after the termination of the alleged conspiracy, merely the narration of a past event and not admissible in evidence?

8. If a wholesale liquor dealer sells a quantity of liquor and ships it C. O. D. by common carrier to A, and if he records the shipment in his 52-B record as being shipped to A, and it is received at its destination and paid for by B, is the dealer guilty of making a false entry in the absence of any proof that he knew the liquor would not be received by A, or that he knew it would be received by B?

9. Will a conviction be sustained if there is no proof in the record to support it?

10. When the indictment charges the defendant with

making a false entry, is the prosecution required to prove that the entry was willfully and deliberately made, with full knowledge of its falsity?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI.

Petitioners respectfully submit that a review of this case on writ of certiorari should be allowed. It should be allowed because the United States Circuit Court of Appeals has decided an important question of federal law, relating to wholesale liquor dealers, which should be settled by this Court. It should be allowed because, in convicting petitioners, the District Court and the Circuit Court of Appeals have so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

It should be allowed because the Circuit Court of Appeals has affirmed a conviction that was obtained solely upon incompetent and prejudicial evidence. This evidence consisted of testimony concerning statements of an alleged co-conspirator, outside the presence of the defendants, after the arrest of the alleged co-conspirator and after the alleged conspiracy had terminated. This conviction was accomplished through said incompetent testimony and, inasmuch as the liberty of petitioner Meyer is involved, this Court should review the record of this case. In the case of Sheppard v. U. S., 290 U. S. 96, the conviction of the defendant was accomplished through the erroneous admission in evidence of a statement which the prosecution mistakenly contended constituted a dying declaration. This Court granted certiorari and reviewed the record of that case because of the admission of the prejudicial and incompetent testimony.

If the decision of the United States Circuit Court of

Appeals in this case stands, every wholesale liquor dealer will be in constant danger of criminal prosecution, regardless of how scrupulously he attempts to operate his business in accordance with law. Unless the law is definitely settled to mean that the wholesaler must know that an entry is false at the time he makes it, and that the prosecution must prove that he knew of such falsity at the time of making the record, every wholesale liquor dealer will be in danger of prosecution and conviction each time that he records any entry of liquor received or sold. Each time that he makes an entry of liquor sold and shipped to a certain person, and it is afterward proved that the shipment was received by someone other than the consignee designated in the entry, the wholesaler will be in danger of being convicted of a felony and deprived of his liberty, regardless of whether the entry was made in good faith in the honest belief that the liquor was shipped to the person named in the entry. Mere proof that the facts recorded in the entry are not true will be sufficient to support a conviction regardless of whether the wholesaler made the entry with knowledge of its falsity or with criminal intent. An honest wholesaler will be at the mercy of every criminal adventurer who procures a federal retail liquor dealer's license and attempts to purchase liquor of him. He will deal with a stranger at his absolute peril.

HAROLD J. BANDY,
JOHN M. KARNS,
Counsel for Petitioners.

BRIEF

In Support of Petition for Writ of Certiorari.

I.

JURISDICTION.

Certiorari is sought in this case upon the authority of ection 240 (a), as amended [28 U. S. C. A., Section 347 a)], which gives this Court jurisdiction to review any dgment or decree of the United States Circuit Court Appeals.

II.

The judgment became final on December 18, 1940, when ne petition for rehearing was denied.

III.

If, from the record or facts of which the Court may take otice, it appears that the conviction cannot stand, plain rror appears on the record, and the judgment will be eversed.

Clyatt v. U. S., 197 U. S. 207;
Gambino v. U. S., 275 U. S. 310.

IV.

Where there is no evidence to support the charges in he indictment, the conviction should be set aside.

V.

The arrest of a co-conspirator precludes any further ction by him, and puts an end to the conspiracy and enders statements made by him after his arrest incom-petent against his former co-conspirators.

Graham v. U. S., 15 F. (2nd) 740;
Mayola v. U. S., 71 F. (2nd) 65.

VI.

A narrative of past events by a co-conspirator is not admissible in evidence.

Van Riper v. U. S., 13 F. (2nd) 961 at p. 967;
Clark v. U. S., 61 F. (2nd) 409 at p. 410.

The language of this Court in Sheppard v. U. S., 290 U. S. 96, in relation to the erroneous admission of an alleged dying declaration, pertinently applies to the error of admitting testimony concerning conversation with Chester Tork outside the presence of petitioners, after Tork had been arrested. In that opinion the Court says: "The testimony now questioned faced backward and not forward. This at least it did in its most obvious implications. What is even more important, it spoke to a past act, and more than that, to an act by someone not the speaker" (Sheppard v. U. S., 290 U. S. 96).

VII.

Courts will not receive testimony of a witness as to what some other person told him as evidence of the fact asserted.

Will v. Tornabells, 217 U. S. 47;
Nelson v. Flint, 166 U. S. 276;
Hopt v. Utah, 110 U. S. 574.

VIII.

Acts and declarations made and done after a conspiracy has ended are not competent against a co-defendant.

Logan v. U. S., 144 U. S. 263;
Leady v. U. S., 280 F. 864;
Brian v. U. S., 17 F. (2nd) 741;
Feder v. U. S., 257 F. 694.

IX.

Failure of a party to call an available witness possessing peculiar knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such person would not sustain the contention of the party.

22 C. J., pp. 115-116;
10 R. C. L. 884.

X.

In order for one to be guilty of making a false entry, it must be shown by competent evidence that the act was willfully done. It must be shown that it was done with full knowledge of the falsity. The word "willfully" denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. When used in a criminal action it means an act done with a bad purpose.

U. S. v. Murdock, 290 U. S. 389;
Felton v. U. S., 96 U. S. 699;
Potter v. U. S., 155 U. S. 438;
Spurr v. U. S., 174 U. S. 728.

Respectfully submitted,

HAROLD J. BANDY,
JOHN M. KARNS,
Counsel for Petitioners.

APPENDIX.

Opinion of the United States Circuit Court of Appeals for the Seventh Circuit.

Before Evans, Major and Kerner, Circuit Judges.

Kerner, Circuit Judge. In this case two indictments were returned by the grand jury against the appellants, Monarch Distributing Company and Joseph S. Meyer, together with Lee Miller and Thomas W. Moore.

Indictment No. 15,126 charged appellants and Lee Miller with violating Title 26, U. S. C. A., Sec. 2857, 53 Stat. 327, by falsifying certain records required to be kept under internal revenue laws and regulations. Said section of the statute requires every wholesale liquor dealer to keep daily a record of distilled spirits received and disposed of by him, in such form as may be prescribed by the Commissioner of Internal Revenue. It further provides that every wholesale liquor dealer who neglects to make entries therein shall, on conviction, be fined not less than $100 nor more than $5,000 and be imprisoned not less than three months nor more than three years.

Indictment No. 15,129 charged appellant Monarch Distributing Company and defendants Thomas W. Moore and Lee Miller with violating Title 26 U. S. C. A. Sec. 2857 (53 Stat. 327), Title 26 U. S. C. A. Sec. 3793 (53 Stat. 468), and Title 18 U. S. C. A. Sec. 390 (35 Stat. 1137) which provides:

> "Whoever shall knowingly ship or cause to be shipped, from one state, * * * any package of or package containing any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein, shall be fined not more than $5000."

The last count of each indictment charged conspiracy.

The indictments were consolidated for trial. A jury was waived and the cases were tried before the Court. The defendants Lee Miller and Thomas W. Moore were not placed on trial. The District Court in 15,126 found both appellants guilty upon all counts excepting count 11 and sentenced Joseph S. Meyer to imprisonment for a term of two years and to pay a fine of $1000 and ordered Monarch Distributing Company to pay a fine of $2500. In 15,129 the court found Monarch Distributing Company guilty upon all counts and ordered that it pay a fine of $2500. To reverse the judgments Meyer and the Monarch Distributing Company have appealed.

Count one of the indictment in 15,126 charges that on July 21, 1939 the Monarch Distributing Company and Joseph S. Meyer, its employee, who was in possession and control of the books and records of the corporation, did unlawfully, willfully, etc. make a certain false entry on a certain record required to be kept, known as Treasury Department Form 52A, purporting to represent that certain alcoholic spirits were received on July 22, 1939; that said entry was false in that the alcoholic spirits were in fact received on July 20; that said entry was further false in that it was not made on July 22, but was in fact made on July 24, 1939.

The record discloses that the Monarch Distributing Company operated a wholesale liquor business at East St. Louis, Illinois, and that Meyer was one of its employees. On July 20, 1939, the Skye Distributing Company sold and delivered to the Monarch Distributing Company 41 cases of liquor and at the time of the delivery a check in payment of a portion of this liquor was given by Meyer to the driver delivering the liquor. On the morning of July 21 an inspector of the Alcohol Tax Unit, in the course of his duties, inquired of Meyer if all receipts of merchandise had been recorded on Form 52A and was told that all

entries had been made. Thereupon the record was checked, but it showed no entry of the receipt of the liquor received on July 20. Another examination of the record was made at 10 A. M. July 22. This too showed no entry recording the receipt of the liquor. On July 24 an examination disclosed that an entry had been made evidencing the receipt of the liquor as of July 22. This entry was not made prior to 10 A. M. July 24.

The evidence also showed that either on the evening of July 20 or the early morning of July 21, a portion of the liquor had been removed from the boxes in which it had been delivered by the Skye Distributing Company and sold to Melvin Thompson on July 22.

Meyer testified "the shipment arrived in the afternoon of July 21. The next day was Saturday and I was busy. It probably laid on my desk and was not handed to the girl until some time on Monday."

The point is made that appellee introduced no evidence to show there were any regulations concerning the making of the entry. We are unable to see any merit to the point for the reason that the appellants were bound to keep the records prescribed by the statute and make the proper entries whether the Commissioner of Internal Revenue had prescribed any rules and regulations, on the subject or not. Quantity of Distilled Spirits, Fed. Cas. 11494 and United States v. Dutcher, Fed. Cas. 15013. Moreover, there was no necessity for their formal introduction, they being matters of which the courts of the United States take judicial notice. Sprinkle v. U. S., 141 F. 811, 820.

It is next insisted that the fact that appellants did not record the purchase on the day the liquor was received, does not constitute the making of a false entry. To be sure, to constitute the offense of neglecting to make the entry, there must not only be an omission to make the entry, but the failure must be intentional. Arrow Distil-

leries v. Alexander, 109 F. (2) 397, 406. Whether the omission was due to carelessness or design was the province of the District Court to determine from the evidence. In our passing upon the sufficiency of the proof, it is not our province to weigh or determine the credibility of witnesses. We must take that view of the evidence most favorable to appellee and sustain the finding of the trial court if there be substantial evidence to support it. The trial court found the appellants guilty, thus, necessarily, it found that the omission was intentional or by design and we agree there was ample proof of acts and that the reasonable inference flowing therefrom warranted a finding that the appellants acted in bad faith and knowingly violated the statute.

The sixth count of the indictment in 15,126 charged that on October 13, 1939, the appellants made a false entry in their 52B record. This is the daily record of sales required to be kept by a wholesale liquor dealer. It was alleged that the false entry was to the effect that certain described liquor had been sent to Joe Nelson, Leonard, Texas, when, in fact, it had been sent to Joe Nelson, then and there located at Kansas City, Missouri.

On Monarch Distributing Company's 52-B record appears an entry that on October 13, 1939, it sold and sent to Joe Nelson, Leonard, Texas, 38 cases of liquor. The liquor and an invoice was delivered to Riss & Company, a common carrier operating motor vehicles between East St. Louis, Illinois, and Kansas City, Missouri, consigned C. O. D. to Joe Nelson, Kansas City, Missouri. Upon the arrival of the liquor at Kansas City, Missouri, it was delivered to Chester Tork, who paid $649.32 therefor and acknowledge receipt of the liquor by signing the name of Joe Nelson. Tork had the liquor transferred to a Ford truck, which was then driven into Kansas City, Kansas. In that city the truck was stopped by investigators of the

Alcohol Tax Unit, Treasury Department, and Tork and the driver of the truck were placed under arrest. The bill of lading and the original freight bill were found on the person of Chester Tork. There were no words describing or designating the consignee's name or address on the cartons or boxes in which the liquor was contained.

The record further discloses that Chester Tork appeared at the office of the Monarch Distributing Company on July 8, 1939 and there conversed with Joseph S. Meyer. In addition to the shipment of liquor above discussed, there were others, commencing July 27, 1939, consigned to Joe Nelson, Kansas City, Missouri.

During the trial a man in the custody of Government agents was present in the court room. This man did not testify but was identified as Chester Tork.

William E. Grinn, an investigator for the Alcohol Tax Unit, testified that Leonard, Texas, is located in his territory and has a population of 1300; that he made a special investigation of the town relative to locating a person named Joe Nelson, interviewing the postmaster, letter carriers, city marshal, sheriff of the county and his chief deputy, the hotel man and six of the twelve merchants in the town; and that he was unable to locate a person named Joe Nelson.

On September 20, 1939 investigators of the Alcohol Tax Unit informed Meyer that an investigation had disclosed no person named Joe Nelson at Leonard, Texas.

Joseph S. Meyer testified that he knew a person by the name of Joe Nelson of Leonard, Texas; that Nelson came to the office about July 21, tendered a receipt for a retail liquor dealer's permit and gave an order for liquor to be shipped to him at Leonard, Texas, and said he would make future orders by telephone, and pay C. O. D.; that Nelson gave his first order by telephone on July 27 and directed that the liquor be shipped to Kansas City, Missouri, where

it would be picked up by Nelson and taken to Leonard, Texas. On cross-examination Meyer testified that he saw Nelson only once and that Chester Tork was not Nelson.

The first three counts of the indictment in 15,129 charged that on March 27, March 31 and June 30, 1939, the Monarch Distributing Company made false entries in its 52-B record. These counts alleged that the false entries were to the effect that certain described liquor had been sent to Mike O'Brien, Wichita, Kansas, when, in fact, it had been sent to a person or persons other than Mike O'Brien, whose name or names and address or addresses were unknown to the grand jurors.

On Monarch Distributing Company's 52B records appear entries that on March 27 and 31 and June 30, 1939, it sold to and sent to Mike O'Brien, Wichita, Kansas, a designated number of cases of liquor, and invoices bearing Nos. 2088, 2092 and 2132 respectively were issued by the Monarch Distributing Company in which were described the liquor sold and the sale price.

On July 2, 1939, Sidney Kennedy, an investigator of the Alcohol Tax Unit, intercepted an automobile bearing Oklahoma license plates and driven by one Heil Armitage, in which spiritous liquors were found corresponding to the liquors set forth in invoice 2132 issued by the Monarch Distributing Company and entered in the 52B record as having been sold and sent to Mike O'Brien, Wichita, Kansas.

Mike O'Brien testified that in July of 1938 he resided at Wichita, Kansas, but since August he has lived in Belleville, Illinois; that that fact was known to the defendant Moore and that he had not made the purchases of liquor entered on the 52B records under date of March 27 and 31 and June 30, 1939, and evidenced by invoices Nos. 2088, 2092 and 2132. He further testified that he did not know that such merchandise had been consigned in his name and

had not authorized any one to obtain such merchandise in his name.

Appellant adduced the testimony of several employees of the Monarch Distributing Company to the effect that a number of shipments of spirituous liquors were made to O'Brien in the early part of 1939, which were loaded into O'Brien's automobile.

At the conclusion of the trial the District Court stated: "I have eliminated from consideration all hearsay and have reached my conclusion solely upon the competent evidence in the case."

Now, counsel for appellants argues that there is a total failure of proof and that the court erred in admitting the testimony of the witness Grinn.

We are of the opinion that no reversible error was committed by the trial court in permitting Grinn to testify, and it was proper for the court to consider all of the evidence, direct and circumstantial, determine what witnesses it believed or did not believe, and to say whether or not the charges in the indictment had been established beyond a reasonable doubt. This the court has done, rendering a finding against the appellants. After a careful consideration of the entire record, we find nothing to warrant a reversal.

Since we have indicated that the evidence was sufficient as against the appellants under the first and sixth counts of the indictment in 15,126 and the first three counts of the indictment in 15,129, and as the penalty imposed was not more than could have been imposed under them if they had stood alone, we need not consider the other counts of either indictment for the reason that errors, if any were committed under the counts not discussed, are not grounds for reversal, Whitfield v. Ohio, U. S. 431, 438 and Roberts v. U. S., 96 F. (2) 39.

Judgments Affirmed.

No. 704

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1940.

MONARCH DISTRIBUTING COMPANY, a Corporation, and JOSEPH S. MEYER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL REASON RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI, WHICH PETITIONERS PRAY WILL BE CONSIDERED AS A PART OF THE ORIGINAL PETITION FOR WRIT OF CERTIORARI.

HAROLD J. BANDY,
JOHN M. KARNS,
604 Spivey Building,
East St. Louis, Illinois,
Counsel for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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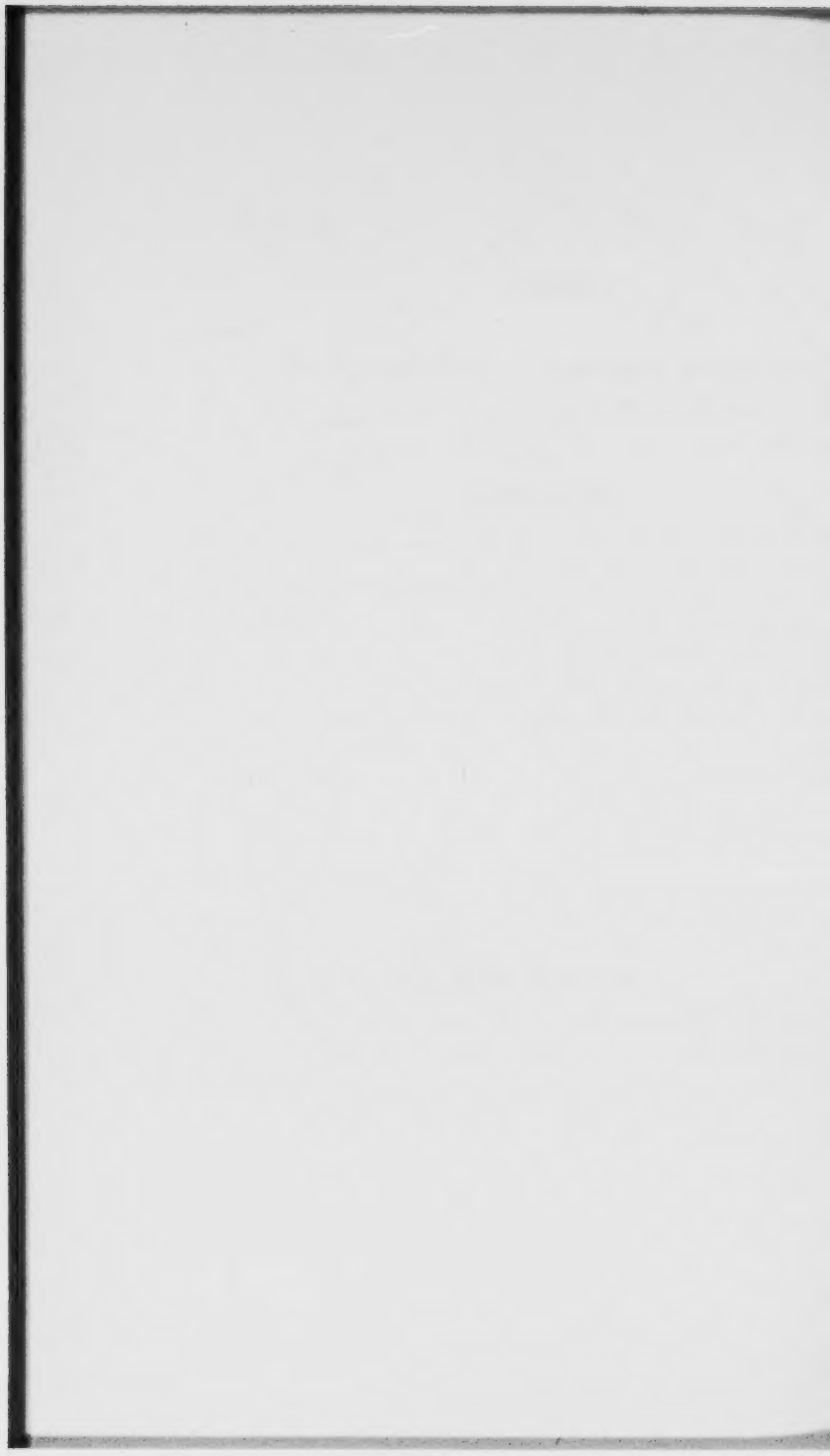

IN THE

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, by their undersigned counsel, having heretofore filed their petition with this Honorable Court for the issuance of the writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause, and thirty days not having elapsed since rehearing was denied by the Court of Appeals in said case, now submit the following addi-

tional reason for allowance of the writ of certiorari and respectfully pray that this will be considered as a part of their original petition.

The Court of Appeals affirmed the conviction of petitioners upon counts 1 and 6 of indictment 15,126, and the conviction of petitioner Monarch Distributing Company upon counts 1, 2 and 3 of indictment 15,129. Each of these counts charges a violation of an Act of Congress enacted June 26, 1936, which requires rectifiers and wholesale liquor dealers to keep certain records, and which makes falsification of such records a felony.

The counts upon which these convictions have been affirmed do not charge a violation of any law of the United States. The statute upon which these counts are assumed to be predicated says: "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business, covered by his special tax stamp, a record of distilled spirits received and disposed of by him," etc. The third paragraph provides that: "Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner of Internal Revenue, * * * or makes any false entry therein," etc., shall be punished.

No one is amenable to the provisions of this statute unless he is a rectifier or a wholesale liquor dealer, and unless he receives and disposes of distilled spirits.

The counts upon which these convictions stand do not allege that petitioners were rectifiers or wholesale liquor dealers, or that they received and disposed of distilled spirits. An indictment which does not contain these necessary allegations does not charge the commission of a crime. These are essential elements of the crime the statute denounces.

Count 1 of indictment 15,126 (R. pp. 2-4, incl.) charges that on July 21, 1939, Monarch Distributing Company was

a corporation "engaged in the business of purchasing and selling vinous and alcoholic spirits and beverages," and that petitioner Joseph S. Meyer was an employee and agent of said corporation. **Nowhere does the count charge that either petitioner was a rectifier or a wholesale liquor dealer, or that either of them received and disposed of "distilled spirits."** The count refers to "vinous and alcoholic spirits and beverages," but does not mention distilled spirits.

The allegations in count 6 of indictment 15,126 (R. pp. 11 and 12) are exactly the same, in this respect, as those in count 1. The same is true of count 1 (R. pp. 29 and 30), count 2 (R. pp. 30-32, incl.) and count 3 (R. pp. 32 and 33) of indictment 15,129.

The offense which the statute creates was unknown at common law. It is strictly a statutory offense. Unless a person is a rectifier or wholesale liquor dealer, engaged in the business of receiving and disposing of distilled spirits, the statute does not apply to him.

The failure to aver that petitioners were wholesale liquor dealers, engaged in the business of receiving and disposing of distilled spirits, is a fatal defect of substance, and not a mere defect of form. It is a defect that may be attacked at any time, before or after judgment. An indictment which fails to allege that petitioners were rectifiers or wholesale liquor dealers will not support a judgment of conviction. The convictions upon these fatally defective counts are subject to challenge and voidable at any time before petitioners have served their sentences and paid their fines.

Failure to attack these indictments in the District Court or the Court of Appeals does not preclude petitioners from attacking them now. Because the omissions constitute defects of substance, petitioners have not waived their right to attack the indictments. These indictments do not fol-

low the language of the statute and do not incorporate all the basic and essential ingredients that make up the offense that is defined and denounced by this statute.

That a person must be a rectifier or a wholesale liquor dealer before he can be prosecuted under this statute is fundamental. The indictment can reach him only if it charges that he is within the class that the statute covers.

The failure of these counts to incorporate necessary allegations plainly appears upon the record of this case. Petitioners respectfully submit that this Honorable Court should take cognizance of this error, despite the fact that it was not called to the attention of the District Court or the Court of Appeals. It is the rule that, where plain error appears from an examination of the record, a judgment of conviction cannot stand.

ADDITIONAL QUESTION PRESENTED.

Can a conviction stand which is predicated on an indictment fatally defective in substance?

Petitioners once more respectfully petition this Honorable Court to consider this additional reason as a part of the petition for the writ of certiorari to be issued.

Respectfully submitted,

HAROLD J. BANDY,
JOHN M. KARNS,
Counsel for Petitioners.

SUPPORTING BRIEF.

I.

The objection that the indictment fails to describe various acts intended to be proved with that reasonable certainty which the law requires, or fails to charge an offense known to the law, or states no offense within the jurisdiction of the Court, is fatal at any stage and is not waived by failure to take advantage thereof at any preliminary stage of the proceedings. Failure to charge definitely essential elements of the offense is not waived by failure to move to quash the indictment or to arrest judgment thereon. Defects of substance are not cured by plea.

31 C. J., pp. 874 and 875;
Oesting v. U. S., 234 F. 304.

II.

Where an indictment is made a jurisdictional requirement by constitutional guaranty, defendant cannot, by waiving an invalid indictment, confer jurisdiction.

31 C. J. 872.

III.

Defects in substance are not cured by verdict.

U. S. v. Hess, 124 U. S. 483;
U. S. v. Carll, 105 U. S. 611;
Shilter v. U. S., 257 F. 724;
Cohn v. U. S., 258 F. 355.

IV.

An indictment charging a statutory offense must allege all of the essential elements.

U. S. v. Carney, 228 F. 163.

V.

Failure to allege essential elements which are necessary to constitute the crime attempted to be charged does not waive the right to waive the question later.

31 C. J. 878.

VI.

The federal statute which provides that no indictment found by a federal grand jury shall be deemed insufficient by reason of any defect or imperfection in matter of form only that shall not prejudice the defendant does not permit the omission of matters of substance.

Horn v. U. S., 182 F. 721;
Renigar v. U. S., 172 F. 646;
Angle v. U. S., 172 F. 658;
U. S. v. Leach, 291 F. 788.

VII.

If, from the record or facts of which the Court may take notice, it appears that the conviction cannot stand, plain error appears on the record, and the judgment will be reversed.

Clyatt v. U. S., 197 U. S. 207;
Gambino v. U. S., 275 U. S. 310.

VIII.

An indictment must allege all the facts necessary to constitute the crime with which the defendant is charged, and, if it does not set forth such facts with sufficient certainty, it will not support a conviction.

People v. Picard, 284 Ill. 588;
People v. Stoyan, 280 Ill. 300.

Respectfully submitted,

HAROLD J. BANDY,
JOHN M. KARNS,
Counsel for Petitioners.

FILED
JAN 27 1941
CHARLES ELMORE CROPLEY
CLERK

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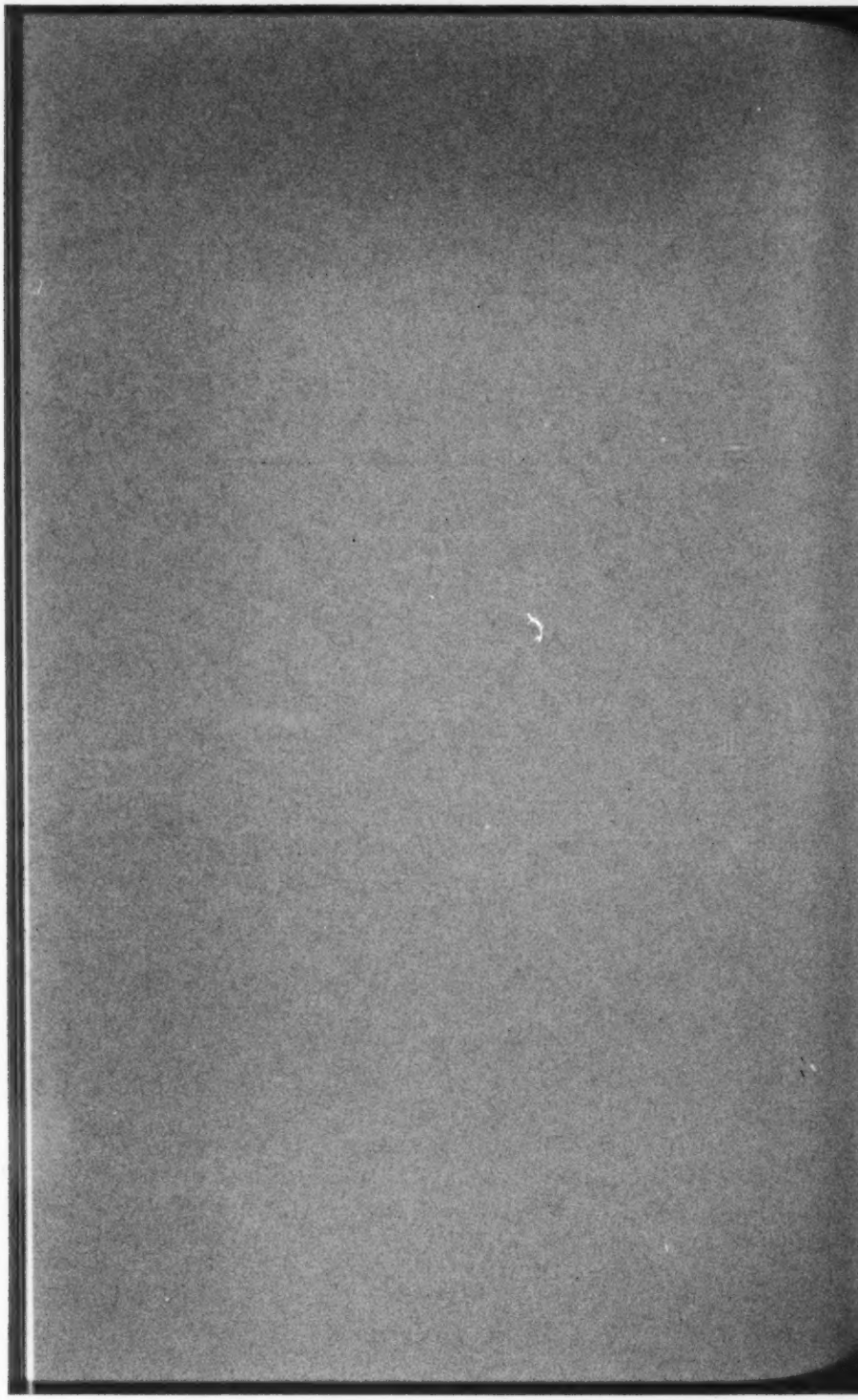
UNITED STATES OF AMERICA,
Respondent.

PETITION

For Leave to Add an Authority to the Supporting Brief Filed by Petitioners in Support of Their Petition for Writ of Certiorari.

HAROLD J. BANDY,
JOHN M. KARNS,
604 Spivey Building,
East St. Louis, Illinois,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.



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PETITION

For Leave to Add an Authority to the Supporting Brief Filed by Petitioners in Support of Their Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners in a supplemental petition for certiorari, entitled "Additional Reason Relied Upon For Allowance of Writ of Certiorari," contend that the counts upon which these convictions have been affirmed do not charge a violation of any law of the United States because the statute

under which they were indicted and prosecuted relates only to rectifiers and wholesale liquor dealers and the counts of the indictments in this case fail to allege that petitioners were either rectifiers or wholesale liquor dealers. That is, the counts of these indictments fail to bring petitioners within the classes of people which the statute regulates.

In further support of this contention, **petitioners respectfully petition this Honorable Court for permission to cite the case of Shaw v. United States, ~~229~~ 292 F. 339.**

In that case the defendant, an employee of a national bank which was a federal reserve bank, was indicted and prosecuted for embezzlement under a statute (12 U. S. C. A., Section 592), which makes it a criminal offense for any officer or employee of "any federal reserve bank or any member" to embezzle, etc. The indictment alleged the defendant was an employee of the national bank, but failed to aver that the national bank was a federal reserve bank.

The defendant did not challenge the indictment in the trial court by motion to quash, demurrer, motion in arrest of judgment, or otherwise. However, when this defect was called to the attention of the Court of Appeals for the Eighth Circuit, that court held that the omission constituted a fatal defect in substance, and that the defendant had not waived the question although he had pleaded to the indictment and had not attacked it in the trial court.

The omission in the Shaw indictment which the Court held to be fatal is exactly the same as the omission in the indictments against petitioners. In the Shaw case the indictment failed to allege that the bank from which the money was embezzled was a federal reserve bank, and it thereby failed to bring the defendant within the classifica-

tion made by the statute upon which the prosecution was predicated. In this case the indictments fail to allege that petitioners were wholesale liquor dealers, and they thereby fail to bring petitioners within the classification which is made by Title 26, U. S. C. A., Section 1208, the statute upon which this prosecution is based.

Respectfully submitted,

HAROLD J. BANDY,
JOHN M. KARNS,
604 Spivey Building,
East St. Louis, Illinois,
Attorneys for Petitioners.

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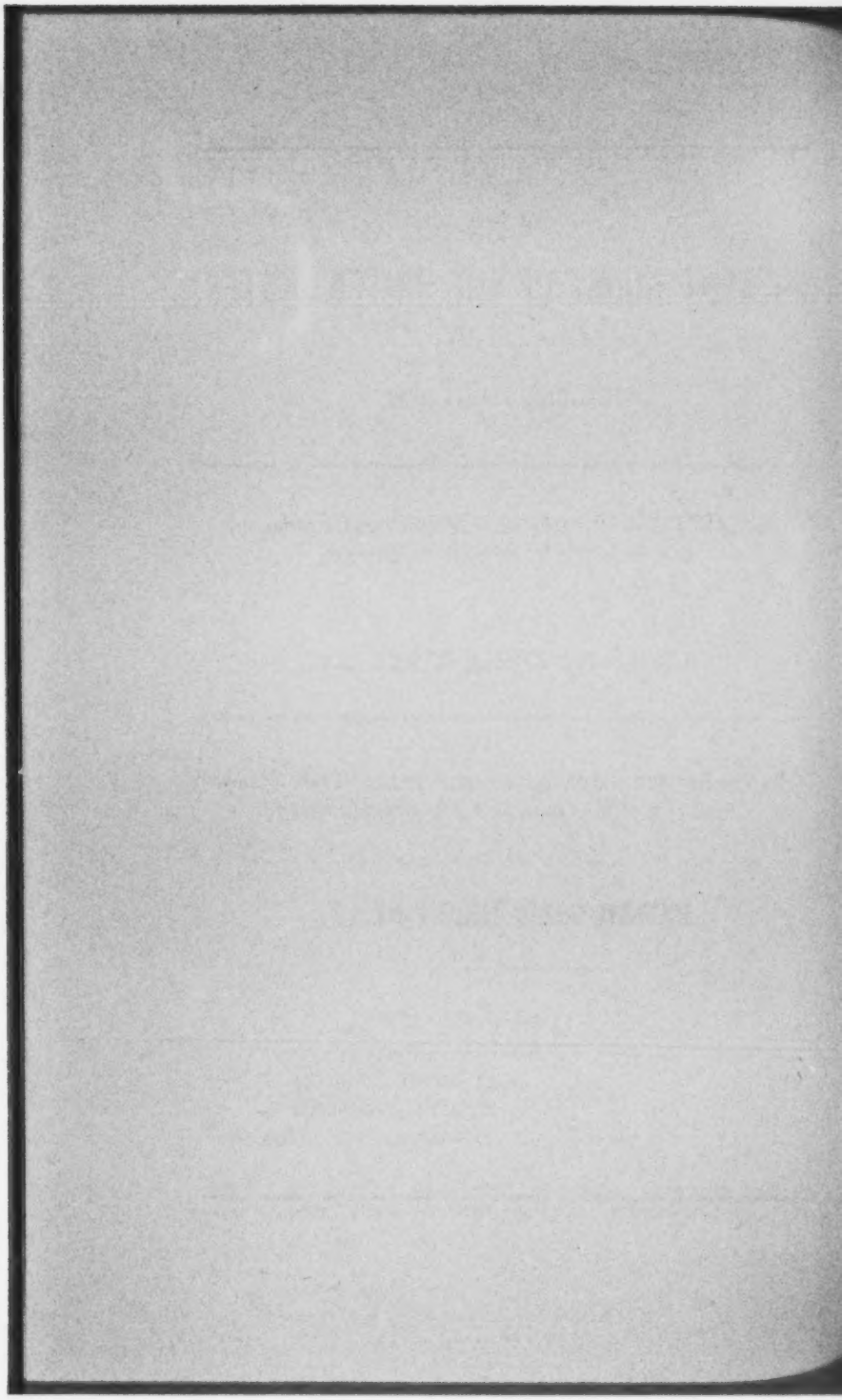
THE UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONERS' REPLY BRIEF.

JOHN M. KARNS,
HAROLD J. BANDY,
602 Spivey Building,
East St. Louis, Illinois,
Attorneys for Petitioners.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.



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PETITIONERS' REPLY BRIEF.

The convictions of petitioners were affirmed only as to counts 1 and 6 of indictment 15126 and counts 1 to 3, inclusive, of indictment 15129. These counts attempt to charge violations of U. S. C. A., Title 26, Section 1208. This statute relates only to rectifiers and wholesale liquor dealers. Only rectifiers and wholesale liquor dealers are subject to the provisions of this statute. Unless a defendant falls within the classification (rectifier or wholesale liquor

dealer), created by this statute, he cannot be prosecuted for violation of it. The statute does not apply to an official, agent or employee of a rectifier or wholesale liquor dealer. The penal section says:

> "Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein, or hinders or obstructs any Internal Revenue officer from inspecting such records or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of one hundred and no/100 ($100.00) dollars, and, on conviction, shall be fined not less than one hundred and no/100 ($100.00) dollars, nor more than five thousand and no/100 ($5,000.00) dollars, and be imprisoned not less than three months nor more than three years."

The counts under which these convictions were affirmed do not charge that petitioner Joseph S. Meyer was either a rectifier or a wholesale liquor dealer. Moreover, **the evidence shows that Meyer was not a rectifier or wholesale liquor dealer.** The evidence shows that he was at one time an employee of Monarch Distributing Company, later vice-president of the company, and afterwards president (R. pp. 388 and 389).

The statute under which these convictions have been affirmed (Title 26, Section 1208) does not provide for the prosecution or punishment of an official, agent or employee of a rectifier or wholesale liquor dealer, and the statute cannot be enlarged to include officials or employees.

Only under a charge of aiding and assisting Monarch Distributing Company in falsifying records required to be kept by a wholesale liquor dealer could Meyer be prose-

cuted (U. S. C. A., Title 26, Section 1693). Counts 8, 9, 10 and 11 of indictment 15126 charge petitioners with violation of said aiding and assisting statute. They charge petitioners with willfully and feloniously aiding and assisting in the preparation of a certain false and fraudulent document in connection with a matter arising under the Internal Revenue Laws of the United States of America, to wit: a certain wholesale liquor dealer's monthly report. These counts charge violation of U. S. C. A., Title 26, Section 1693, which provides, among other things, that

> "any person who willfully aids or assists in, or procures, counsels or advises the preparation or presentation under, or in connection with any matter arising under the Internal Revenue Laws, of a false or fraudulent return, affidavit, claim or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim or document), be guilty of a felony, and, upon conviction thereof, be fined not more than ten thousand and no/100 ($10,000.00) dollars or imprisoned for not more than five years, or both, together with the costs of prosecution."

The conviction of petitioner Joseph S. Meyer was not affirmed under counts 8, 9, 10 and 11 of indictment 15126. The Court merely considered the evidence under counts 1 and 6, and, inasmuch as the punishment assessed did not exceed the maximum that could have been imposed under either count 1 or count 6, refused to consider the other counts of the indictment (116 F. [2nd] 11).

Not only does the indictment wholly fail to allege that Meyer was a wholesale liquor dealer and therefore amenable to the statute under which the convictions have been affirmed, but there is a total failure of proof to show that he was a wholesale liquor dealer. It is provided by Section

3 (c) (1) of the Federal Alcohol Administration Act [U. S. C. A., Title 27, Section 203 (c) (1)]: "It shall be unalwful, except pursuant to a basic permit issued under this Chapter by the Administrator, (1) to engage in the business of purchasing for resale at wholesale distilled spirits, wine or malt beverages." Sections 4 (a) (1) and 4 (a) (2) of the Federal Alcohol Administration Act [U. S. C. A., Title 27, Section 204 (a) (1) (2)] specifies the persons to whom a federal wholesale liquor dealer's basic permit may be issued. The evidence in this case fails to show that petitioner Meyer was the holder of a wholesaler's basic permit. It fails to show that he was a wholesale liquor dealer. There is no evidence in the record that even infers that he was within that class. The only evidence appearing in the record is that he began as an employee of Monarch Distributing Company, later became vice-president of the company and afterwards president (R. p. 388). The statute under which these convictions have been affirmed does not apply to an official or employee of a wholesale liquor dealer. There is total failure of proof in this record to sustain the conviction of Meyer.

It is respectfully and earnestly contended that the conviction of petitioner Meyer is erroneous because:

(1) The indictment fails to charge that he was either a rectifier or wholesale liquor dealer.

(2) The uncontradicted evidence clearly shows that he was not a member of either class.

Moreover, the counts of the indictments which have been affirmed as to petitioner Monarch Distributing Company are fatally defective because they fail to allege that the corporation was a wholesale liquor dealer. In their brief counsel for respondents say: "The records in which the alleged false entries were made were introduced in evi-

dence and, as heretofore stated, they disclosed that they were the records of wholesale liquor dealers, and that the spirits involved were distilled spirits." In other words, respondent contends the indictment has been bolstered by the proof. If this statement is correct all vital omissions in an indictment could be supplied by proof at the trial. The entire indictment could be dispensed with.

Of course, this contention is not correct. The Sixth Amendment to the Constitution guarantees that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury."

The indictment must allege all of the essential ingredients of the statute under which it is drawn, and failure to incorporate necessary allegations in the indictment cannot be supplemented by proof at the trial. Fatal omissions in an indictment cannot be supplied either by bill of particulars or proof. The quoted statement from respondent's brief does not answer our contention that the indictments are fatally defective. It merely says that proof concerning the records was offered at the trial.

Respondent relies upon the case of Hewitt v. U. S., 110 F. (2nd) 1, and says that this case overrules Shaw v. U. S., 292 F. 339, cited and relied upon by petitioners in support of their contention that the counts upon which these convictions have been affirmed are fatally defective. An examination of the Hewitt case, supra, shows that it is not applicable here, and that it does not overrule the decision in the Shaw case. Instead of alleging that the bank which defendants in the Hewitt case robbed was a state bank, the deposits of which were insured by the Federal Deposit Insurance Corporation of the United States, the indictment alleged that the bank was a member of the Federal De-

posit Insurance Company of the United States. The Court properly held that this was merely a formal defect, not prejudicial to the defendants, because the indictment sufficiently apprised the defendants that they were charged with robbing a bank, the deposits of which were insured by the F. D. I. C. of the United States. The Court, in the Hewitt opinion, further said: "The complete omission of any allegation which might reasonably be construed to mean that the bank was so insured would be fatal under the rule announced in Shaw v. U. S., 292 F. 339."

In this case the counts under which conviction of petitioners was affirmed wholly fail and omit to allege that petitioners (or either petitioner) were wholesale liquor dealers. These counts wholly fail to bring petitioners within the class created by the statute. This was true in the Shaw case, 292 F. 339, in which case the Court held the indictment to be fatally defective.

Respondent relies upon the allegation contained in these counts to the effect that the defendants unlawfully, etc., did make a certain false entry on a certain record required to be kept by Monarch Distributing Company, which "purported to constitute the monthly report, or portion of the monthly report, of a wholesale liquor dealer" (R. p. 3).

The allegation that Monarch Distributing Company was required to keep certain records consisting of the monthly report of a wholesale liquor dealer is a bare conclusion. Petitioner was not required to keep such a record unless it was either a rectifier or a wholesale liquor dealer.

It was mandatory for the indictment to allege that petitioners were wholesale liquor dealers in order to bring them within the condemnation of the statute, and the failure of the counts to contain this necessary allegation con-

stitutes a fatal defect that requires reversal of the convictions.

For the reasons herein expressed, petitioners once more respectfully submit that the writ of certiorari should issue, directed to the United States Circuit Court of Appeals for tthe Seventh Circuit.

JOHN M. KARNS,
HAROLD J. BANDY,
602 Spivey Building,
East St. Louis, Illinois,
Attorneys for Petitioners.

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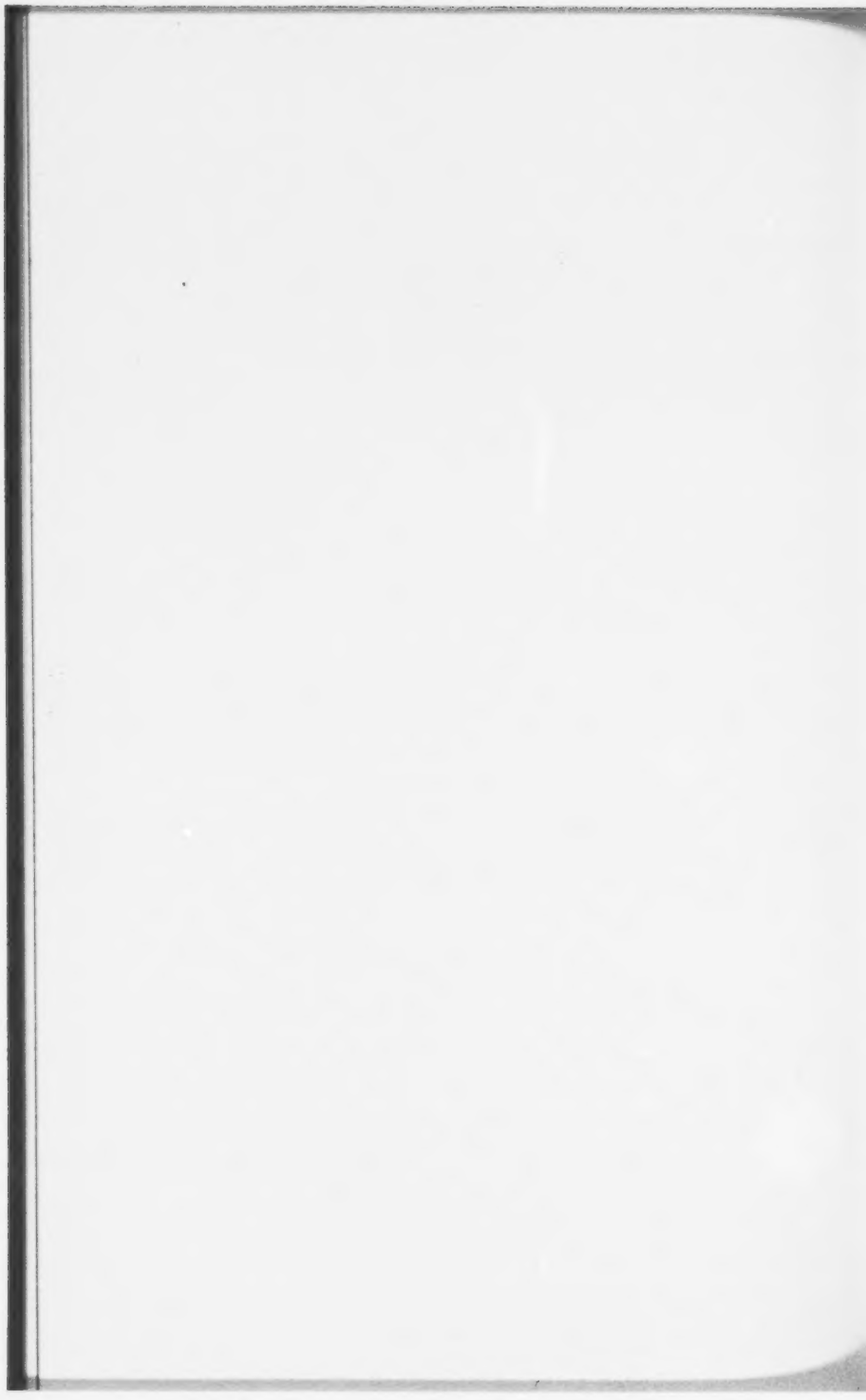

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 704

MONARCH DISTRIBUTING COMPANY, A CORPORATION, AND JOSEPH S. MEYER, PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 495–501) is reported in 116 F. (2d) 11.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered December 5, 1940 (R. 501), and a petition for rehearing (R. 503–516) denied December 18, 1940 (R. 517). The petition for writ of certiorari was filed January 16, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of

the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The petition for a writ of certiorari and supplements thereto recite eleven questions presented, which seem to reduce themselves to two:

1. Whether Counts 1 and 6 of Indictment 15126 and Counts 1 to 3, inclusive, of Indictment 15129 are so deficient in substance as to be open to attack for the first time in this Court.

2. Whether there was a complete failure of proof to support petitioners' convictions upon Count 1 or Count 6 of Indictment 15126.

STATUTE INVOLVED

Section 2857 of the Internal Revenue Code (53 Stat. 1, 327; U. S. C. Supp. V, Title 26, Sec. 2857) provides in part:

> (a) Requirements.—Every rectifier and wholesale liquor dealer shall keep daily, at his place of business covered by his special tax stamp, a record of distilled spirits received and disposed of by him, and shall render under oath correct transcripts and summaries of such records: * * * The records shall be kept and the transcripts shall be rendered in such form, and under such rules and regulations as the Commissioner [of Internal Revenue], with the approval of the Secretary [of the Treasury], may prescribe.
>
> * * * * *

Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner, with the approval of the Secretary, or to make entries therein, or cancels, alters, or obliterates any entry therein (except for the purpose of correcting errors) or destroys any part of such records, or any entry therein, *or makes any false entry therein*,[1] or hinders or obstructs any internal revenue officer from inspecting such records or taking any abstracts therefrom, or neglects or refuses to preserve or produce such records as required by this chapter or by regulations issued pursuant thereto, shall pay a penalty of $100 and, on conviction, shall be fined not less than $100 nor more than $5,000, and be imprisoned not less than three months nor more than three years.

* * * * *

STATEMENT

Two indictments were returned in the United States District Court for the Eastern District of Illinois (Indictments 15126 and 15129). Indictment 15126 (R. 2–26) involves both petitioners, while Indictment 15129 (R. 29–42) involves petitioner Monarch Distributing Company alone.

Indictment 15126 contains 12 counts, and Indictment 15129 seven counts. A jury being

[1] The counts herein discussed are all predicated upon this provision of the statute.

waived (R. 421), the District Judge tried the cases and found both petitioners guilty under 11 of the 12 counts of Indictment 15126 (R. 423). Petitioner Monarch Distributing Company was found guilty under all counts of Indictment 15129 (R. 424). Petitioner Meyer was fined $1,000 and sentenced to imprisonment for two years (R. 427–428). Petitioner Monarch Distributing Company was fined $2,500 upon each indictment. These punishments were not allocated to any one count. (R. 425–426, 429–430.)

The Circuit Court of Appeals in affirming the convictions considered only Counts 1 and 6 of Indictment 15126 and Counts 1 to 3, inclusive, of Indictment 15129, the punishment imposed under each indictment not being in excess of that which could be imposed under any one of the counts considered. Petitioner Monarch Distributing Company concedes the sufficiency of the evidence to sustain its conviction under Counts 1 to 3, inclusive, of Indictment 15129 (Pet. 14), but asserts that those counts are fatally deficient (Supplements to petition). Both petitioners challenge the sufficiency of the evidence as to Counts 1 and 6 of Indictment 15126, as well as the adequacy of those counts.

Count 1 of Indictment 15,126 charged that the petitioner Monarch Distributing Company, and petitioner Meyer, and another, who had control of the books and records of the corporation, made

a false entry in a certain record required to be kept, known as Treasury Department Form 52A, which record constituted a portion of the monthly report of a wholesale liquor dealer. This entry represented that certain alcoholic spirits were received by the defendants from the F. J. Skye Distributing Company on July 22, 1939 (R. 132–133), and the count alleged that the entry was false in that the spirits were in fact received on July 20, and was further false in that the entry was not made on July 22, the date it purported to have been made, but on July 24, the defendants well knowing the entry to be false (R. 2–4).

The principal Government evidence relating to Count 1 is as follows: The parties stipulated in the District Court that the Skye Distributing Company sold and delivered 41 cases of liquor to the Monarch Company on July 20, 1939 (R. 342; Govt. Ex. 17, R. 283), and Revenue Inspector Brendel testified that he observed a Skye Distributing Company truck unloading liquor at the Monarch Company on the evening of July 20, and that petitioner Meyer was present (R. 349). The parties stipulated that a check was given in payment to the Skye truck driver, Hameton [Hamilton] (R. 342). Hamilton recalled an evening delivery to Monarch about that time but could not recall the date, and testified that Meyer gave him the check (R. 369).

Inspector Brendel checked the Monarch records on July 21, on July 22, and at 10:00 A. M., July 24, and found no entry of the receipt of this shipment.

Subsequent to that time the shipment was recorded as having been received on July 22 (R. 132–133). Brendel testified that when Meyer was asked on July 21 whether any receipts or disposals remained unrecorded, he replied there were none (R. 372). Meyer testified that the shipment was received from Skye Company on July 21, entry thereof being made on July 24, under date of July 22 (R. 389).

On July 21 the Monarch Company made a substantial sale of liquor to one Melvin Thompson which, as shown by a comparison of the Skye and Thompson invoices, included numerous cases of liquors that were received from the Skye Company on July 20 (R. 373; Govt. Ex. 17, R. 283; Govt. Ex. 58, R. 412–414).

Count 6 of Indictment 15126 charged that on October 13, 1939, the Monarch Co., Meyer, then its vice president, and another, made a false entry on a record required to be kept, known as Treasury Department Form 52 B, which record constituted a portion of the monthly report of a wholesale liquor dealer. The entry represented that certain alcoholic spirits had been sent to Joe Nelson, whose address was Leonard, Texas (R. 224–225), and the count alleged that the entry was false in that the shipment was not sent to Joe Nelson at Leonard, Texas, but was in fact sent to one Joe Nelson located at Kansas City, Missouri, the defendants well knowing the entry to be false (R. 11–12).

The principal Government evidence with reference to Count 6 is as follows: On October 13, 1939,

the Monarch Company sold, and recorded on its Treasury Department Form 52B, a sale of liquor to Joe Nelson listing his address as Leonard, Texas (R. 224–225, 281, 325).[2] The liquor was, however, actually consigned C. O. D. via Riss & Co., a motor vehicle common carrier, to Joe Nelson, Kansas City, Missouri (R. 318–319). Riss & Co. employees identified one Chester Tork as the man who paid for and received the goods in Kansas City, identifying himself as Joe Nelson (R. 344, 345, 347). Inspector Brendel saw Chester Tork in Meyer's office on July 18, 1939, where Meyer and Tork were closeted for about an hour (R. 343). There had been numerous prior sales by Monarch to Joe Nelson, Leonard, Texas (R. 265–282), and entries of such sales on Treasury Form 52 B (R. 146, 150, 172, 178, 184, 192, 206, 210, 222), which had come to Brendel's attention (R. 343, 349, 370).

Revenue Inspector Grinn testified that he made three trips to Leonard, Texas, which has a population of about 1,300, that he interviewed the postmaster (who called in the rural carriers), the hotel man, 6 of the 12 retail merchants, the City Marshal, the Sheriff, and the Chief Deputy Sheriff, and found that not one of them knew of Joe Nelson (R. 348–349). On September 18, 1939, Brendel told Meyer that investigators for the Alcohol Tax Unit had been unable to locate a Joe Nelson in

[2] The invoice showed a sale of 38 cases (R. 281); the entry recorded 35 cases.

Leonard, Texas, and that nothing was known of him in Leonard or its vicinity (R. 374). Inspector Carrier was present at the conversation and corroborated Brendel's testimony (R. 376). The sale of October 13, 1939, was, nevertheless, entered as a sale to Joe Nelson, Leonard, Texas.

When the shipment to Nelson was seized in Tork's possession, the name of Joe Nelson, Leonard, Texas, was not written or printed on any of the cartons containing the liquor, nor were there any marks of any kind on the cartons showing the consignee or destination (R. 416).[3]

Counts 1 to 3, inclusive, of Indictment 15,129 charged that on March 27, March 31, and June 30, 1939, respectively, petitioner Monarch Distributing Company and others, not including petitioner Meyer, made certain false entries on Form 52 B, i. e., that certain described liquors had been sent to Mike O'Brien, whose name or names and address they had been sent to a person or persons other than Mike O'Brien whose name or names and address or addresses were unknown to the grand jurors (R. 29–33). The sufficiency of the evidence to sustain the conviction under these counts is not challenged.

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[3] U. S. C., Title 18, Section 390, makes it a crime to make an interstate shipment of a package containing intoxicating liquors unless the name of the consignee is plainly labeled on the outside of the package.

ARGUMENT

I

In supplements to their petition the petitioners concededly urge for the first time that Counts 1 and 6 of Indictment 15,126 and Counts 1 to 3, inclusive, of Indictment 15,129 are fatally defective because the statute penalizes rectifiers and *wholesale liquor dealers* who falsify their records of *distilled* spirits received and disposed of, whereas the counts in question fail to charge that the petitioners were either rectifiers or wholesale liquor dealers or that the spirits were distilled spirits.

Each count charged that the defendants made a false entry in a record required to be kept by them, which record constituted a portion "of the monthly report of a wholesale liquor dealer." Each also refers specifically by line, page, and date to the Treasury Department Form wherein the false entry was recorded (R. 3, 11–12, 29–33). These forms are entitled "Wholesale-Liquor-Dealers Monthly Report" (see, *e. g.*, R. 132–133). It is evident, therefore, that the indictment sufficiently alleged that the petitioners were wholesale liquor dealers.

Each count also describes the liquors received or disposed of by the defendants as "alcoholic spirits" (R. 3, 11–12, 29–33). This term is clearly broad enough to embrace "distilled spirits." Moreover, the forms to which reference is made in each count specifically disclose that they refer only to "dis-

tilled spirits" received and disposed of (see, *e. g.*, R. 132, 224, 225). Plainly the petitioners were sufficiently advised that the spirits involved were distilled spirits.

A comparable attack was rejected in *Hewitt* v. *United States,* 110 F. (2d) 1 (C. C. A. 8th), certiorari denied, 310 U. S. 641, even upon demurrer. In that case—decided by the court that rendered the decision in *Shaw* v. *United States,* 292 Fed. 339, upon which the petitioners rely—the defendants demurred to an indictment which charged that a certain bank was a member of the Federal Deposit Insurance Corporation, whereas it should have charged that it was a bank the deposits of which were insured by that corporation. The Circuit Court of Appeals held that the demurrer had been properly overruled, since as a practical matter no one could have been in doubt as to what was meant by the allegation that the bank was a member of the Federal Deposit Insurance Corporation. The court pointed out that under the rule it announced in the *Shaw* case an indictment is fatally defective only where there is the complete omission of an essential element of the offense sought to be charged.[4]

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[4] In the *Shaw* case the indictment contained no allegation which might reasonably have been construed as charging that the bank in question was a member of the Federal Reserve System (see 292 Fed. at p. 343).

A fortiori the attack upon the counts in question, first made in this court, must fail. The petitioners do not and cannot urge that they were surprised or prejudiced by the asserted deficiences. The records in which the alleged false entries were made were introduced in evidence (R. 46–243) and, as heretofore stated, they disclosed that they were the records of wholesale liquor dealers and that the spirits involved were distilled spirits. In *Hagner* v. *United States,* 285 U. S. 427, 433, this Court stated that "Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment." See also *Cannon* v. *United States,* 116 U. S. 55, 77; *Stumbo* v. *United States,* 90 F. (2d) 828, 832 (C. C. A. 6th).

II

Petitioners urge that the Circuit Court of Appeals erred in upholding their convictions on Indictment 15,126 upon the basis of Counts 1 and 6, because there was a complete failure of proof as to those counts. Since either count will support the sentences imposed, it follows that if there is sufficient evidence as to either, the petitioners' convictions may not be successfully attacked. *Cf. Brooks* v. *United States,* 267 U. S. 432, 441; *Pierce* v. *United States,* 252 U. S. 239, 252; *Abrams* v. *United States,* 250 U. S. 616, 619; *Evans* v. *United*

States, 153 U. S. 584, 607; *Claassen* v. *United States,* 142 U. S. 140.

(1) Count 1 charged that the petitioners made a false entry on Treasury Department Form 52A in that the entry represented that certain spirits were received by them on July 22, 1939, whereas they were in fact received on July 20.[5] There can be no doubt under the evidence that the entry was false. The liquor was recorded on Form 52A as having been received on July 22 (R. 132–133). It was *stipulated* by the parties in the District Court that the petitioners received the liquor from the Skye Company on July 20, 1939 (R. 342), and this stipulation was fully substantiated by the testimony of Inspector Brendel, who observed the liquor being delivered at the petitioners' premises (R. 349). Indeed, petitioners stand convicted of a false entry by their own evidence. Petitioner Meyer testified that the liquor was received on July 21, but was entered on Form 52A, on July 24, as having been received on July 22 (R. 389).

Petitioners' contention seems principally to be that under the statute and Treasury Department regulations a wholesale liquor dealer is not required

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[5] The count also charged that the entry was further false in that it was not made on July 22, the date it purports to have been made, but on July 24. It is unnecessary, however, to consider this charge, since the conviction on Count 1 is amply sustained on the basis of the charge with reference to the falsification of the record as to the date on which the liquor was received.

to enter the receipt of spirits on the day on which the liquor was received, and that, in any event, the petitioners' failure so to record the receipt of the liquor in question did not constitute a violation of the statute unless the omission was actuated by a bad motive, i. e., with an intent to deceive and defraud the Government. This argument would require discussion if Count 1 had charged a violation of that portion of the section which penalizes a wholesale liquor dealer who neglects to keep a daily record of liquor received (*supra*, pp. 2–3),[6] or, possibly, if it were necessary to support the conviction on that count on the basis of the charge therein that the entry was false because not made on the date it purportedly was made. (See footnote 5, *supra*, p. 12). The argument clearly is not relevant to the charge in Count 1 that the petitioners represented by their entry that the liquor was received on July 22 whereas, actually, it was received on July 20, or, accepting their own testimony, on July 21.

With respect to petitioners' contention that conviction requires proof that the entry was made "wilfully," i. e., with "bad motive," a sufficient answer is that the statute penalizes, without qualification, one who "makes a false entry." Nowhere does the statute make wilfulness an element of the

[6] It is therefore unnecessary to consider the construction which should be given the provision of the statute requiring a wholesale liquor dealer to keep "daily" at his place of business a record of distilled spirits received and disposed of (*supra*, p. 2).

crime of false entry, or indeed of any of the acts or omissions penalized thereby. It is, of course, open to Congress in the prohibition of certain acts—particularly in an area subject to notorious abuses—to provide "that he who shall do them shall do them at his peril." *United States* v. *Balint,* 258 U. S. 250, 252; see also *Reg.* v. *Tolson,* 23 Q. B. D. 168, 60 L. T. R. 899, 902 (1889). It is unnecessary to go so far in the present case. Petitioner Meyer's own testimony shows that the entry was knowingly false (R. 389). Certainly, in the absence of any qualifying language in the statute, no more is required.[7]

(2) Count 6 of Indictment 15,126 charged that the petitioners made a false entry upon Treasury Department Form 52 B in that this entry represented that certain spirits had been sent to Joe Nelson of Leonard, Texas, whereas the shipment was in fact made to one Joe Nelson at Kansas City, Missouri (R. 11–12). Petitioners assert in effect that there was no evidence to overcome the testimony of petitioner Meyer that the liquor was in fact shipped to Joe Nelson at Leonard, Texas, with a stop-over at Kansas City, Missouri, other than allegedly incompetent testimony respecting a statement made by one Chester Tork to Government agents, after his arrest and outside of the presence

[7] The petitioners also assert that the Government was not defrauded of its revenue by virtue of the false entry as to the date the liquor was received. There is nothing in the statute which makes a defrauding of the Government an element of the crime.

of the defendants, that he was taking the liquor, delivered to him at Kansas City, to Topeka, Kansas.

The District Court, however, in finding petitioners guilty upon Indictment 15,126, stated that "I have eliminated from consideration all hearsay and other improper testimony and have reached my conclusions solely upon the competent evidence in the case" (R. 423–424). And the Circuit Court of Appeals, in sustaining petitioners' conviction under Count 6 of Indictment 15126, made no reference to Tork's statement, and rested its affirmance on competent evidence which amply sustains the convictions.

Indisputable evidence shows that the liquor was not sent to Joe Nelson at Leonard, Texas, via Kansas City. The liquor was transported from petitioners' premises in East St. Louis, Illinois, by Riss & Co., a motor-vehicle common carrier, and that company's bill of lading (R. 318–319) and delivery receipt (R. 325) show that the liquor was sent C. O. D. to "Joe Nelson, Kansas City, Missouri." If the shipment had in fact been destined for Leonard, Texas, with a stop-over at Kansas City, these instruments would, of course, have reflected that fact. The record also discloses that upon its arrival at Kansas City the liquor was received by Tork, who paid $649.32 therefor and acknowledged receipt of the liquor by signing the name Joe Nelson (R. 345, 347).

Petitioners further contend that there was n
evidence to show that they had knowledge that th
liquor was not in reality bound for Leonard, Texas
and, therefore, no evidence that they knew th
entry in Form 52B to be false. In addition to th
evidence heretofore recited, establishing that th
liquor was in fact really destined for Kansas City
there was evidence that prior to the shipment o
the liquor petitioner Meyer had been informed b
Revenue Inspectors that they had made an exten
sive investigation in Leonard, Texas, which dis
closed that no such person as Joe Nelson reside
there. Notwithstanding this information, the pe
titioners entered the shipment on Form 52B a
having been made to Joe Nelson, Leonard, Texas.
There is also evidence (R. 416) that petitione
shipped the liquor without labeling the outside o
the packages with either the name of Joe Nelso
or the name of any consignee, although that con
stituted a violation of law (see footnote 3, *supra*
8).[9] In the light of this evidence it cannot b
doubted that petitioners in making the entry knew
it to be false.

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[8] As the District Court intimated, this information shoul
at least have put Meyer "on notice of inquiry" (R. 375). I
also shatters petitioners' argument rested on the displa
to Meyer of a federal retailer's license issued to Joe Nelso
of Leonard, Texas (Pet. 10). In view of this notice tha
Nelson was an impostor, there is no basis for any contentio
that punishment should not be meted out where "the whole
saler accepts the impostor in good faith" (Pet. 13).

[9] Petitioners attack as unsupported by the evidence (Pe
12) the statement in the opinion of the court belo

CONCLUSION

Petitioners' convictions were properly upheld, there is plainly no important question of federal law presented, and there is involved no conflict of decisions. We therefore respectfully submit that the petition for writ of certiorari should be denied.

FRANCIS BIDDLE,
Solicitor General.

WENDELL BERGE,
Acting Assistant Attorney General.

RAOUL BERGER,
Special Assistant to the Attorney General.

GEORGE F. KNEIP,
W. MARVIN SMITH,
Attorneys.

FEBRUARY 1941.

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that the packages were not labeled as required by law (R. 498). The record speaks for itself (R. 416).

Petitioners intimate that the court below, in referring to the nonlabeling of the packages, apparently believed that petitioners were charged in Count 6 with failing to label the packages as required by law, instead of with making a false entry. There is no basis in the language of the opinion for any such assumption. And the petitioners' omission to label, contrary to law, obviously had a bearing on their knowledge of the falsity of their entry.

U. S. GOVERNMENT PRINTING OFFICE: 1941